

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SCHATZ and BEVERLY ORNSTEIN,

Plaintiffs,

-v-

BINARY BITS LLC d/b/a
FRIENDSEAT.COM,

Defendant.

23 Civ. 5361 (PAE) (SN)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

In this copyright action, plaintiffs Howard Schatz and Beverly Ornstein allege that Binary Bits LLC (“Binary Bits”) violated the Copyright Act, 17 U.S.C. § 101 *et seq.*, by displaying plaintiffs’ copyrighted photograph on its website, FriendsEAT.com, without their permission. Dkt. 1. Currently pending is defendant’s October 3, 2023 motion to dismiss the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the copyright claim is barred by the applicable statute of limitations and, alternatively, to limit the attorneys’ fees, damages, and costs recoverable by plaintiffs. Dkt. 21.

On October 24, 2023, the Court referred the motion to United States Magistrate Judge Sarah Netburn. Dkt. 26. On July 29, 2024, Judge Netburn issued a Report and Recommendation to this Court, recommending that the motion to dismiss be denied. Dkt. 30 (“Report”). The Court incorporates by reference the summary of the facts provided in the Report. For the following reasons, the Court adopts the Report’s recommendation in its entirety.

Discussion

In reviewing a Report and Recommendation, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28


U.S.C. § 636(b)(1)(C). “To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF), 2014 WL 4635575, at *2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

As no party has submitted objections to the Report, review for clear error is appropriate. Careful review of Judge Netburn’s thorough and well-reasoned Report reveals no facial error in its conclusions; the Report is therefore adopted in its entirety. Because the Report explicitly states that “the parties shall have fourteen days to file written objections” and that “failure to file these timely objections will result in a waiver of those objections for purposes of appeal,” Report at 10, the parties’ failure to object operates as a waiver of appellate review. *See Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small v. Sec’y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

CONCLUSION

For the foregoing reasons, the Court denies the motion to dismiss. Pursuant to Federal Rule of Civil Procedure 12(a)(4)(A), defendant must answer the complaint by August 29, 2024.

SO ORDERED.


Paul A. Engelmayer
United States District Judge

Dated: August 15, 2024
New York, New York